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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THOMAS EDWARD SMURRO, Cross-complainant and Appellant, v. RICHARD PAUL et al., Cross-defendants and Respondents.	G044982 (Super. Ct. No. 30-2009-00121536) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Derek W. Hunt, Judge. Affirmed.

Thomas Edward Smurro, in pro. per.; and James Toledano for Cross-complainant and Appellant.

Law Office of Tracy Ettinghoff and Tracy Ettinghoff for Cross-defendants and Respondents.

* * *

This is the second appeal in this case. In the first case we affirmed the grant of a special motion to strike (Code Civ. Proc., § 425.16) the cross-complaint in favor of the original plaintiff in this case, Cantamar Community Association (the association), who sued defendant and cross-complainant Thomas Edward Smurro for breaching its CC&R's by failing to trim or remove palm trees that blocked the view of cross-defendants Richard and Charmaine Paul. (*Smurro v. Cantamar Community Assn.* (Aug. 23, 2011, G044217) [nonpub. opn.].)

In addition to the cross-complaint against the association, Smurro also sued the Pauls for breach of the CC&R's and indemnity alleging they failed to engage in informal dispute resolution before complaining to the association. The court granted the Pauls' motion for judgment on the pleadings. Smurro claims his cross-complaint sufficiently alleged the causes of action and the court used an incorrect legal standard in granting the motion. He also argues he was erroneously denied the opportunity to amend the cross-complaint. Finding no error we affirm.

FACTS AND PROCEDURAL HISTORY

A detailed version of the facts is set out in our first opinion and there is no need to repeat them at length here. Suffice it to say that Smurro and the Pauls live in a development governed by the association pursuant to recorded CC&R's, which require a resident to trim any trees deemed to be blocking a neighbor's view. According to the association's complaint, it notified Smurro in writing that some of his trees blocked his neighbors' views and advised that if he did not trim or remove them he would be fined. Smurro took no action. Twice that same year and again two years later the association asked for an informal meeting; Smurro did not respond nor did he reply to to formal request to resolve. The association then filed a complaint. (*Smurro v. Cantamar Community Assn., supra*, G044217, pp. 2-3.)

Smurro filed a cross-complaint against the association and the Pauls. We affirmed the grant of the association's anti-SLAPP motion. (*Smurro v. Cantamar Community Assn., supra,* G044217.)

As to the Pauls, Smurro alleged the existence of a view obstruction policy (view policy), which prohibits maintaining trees that block another's view. It states that before an owner complains to the association's board, the owner must first contact the offending neighbor and ask that the tree be trimmed. In the cause of action for breach of the CC&R's, Smurro alleged the Pauls violated both the CC&R's and the view policy because they did not contact him before complaining to the association and further failed to send to the association a letter detailing attempts to have him voluntarily trim his trees. This, he pleaded, damaged him according to proof and because he was required to hire a lawyer to defend the action. The cross-complaint also contained a count for indemnity, which alleged that if the association prevailed on its complaint his liability would be "solely" "derivative," not due to his own acts "but only from an obligation imposed upon him by law."

The Pauls filed a motion for judgment on the pleadings, which the court granted. In the minute order the court pointed out it could not determine whether the complaint alleged the Pauls had notified the association about Smurro's trees or not. It noted Smurro's allegation he had been damaged by the Pauls' failure to notify him before complaining to the association. The court disagreed, stating his damages were caused by the association's suit against him "for his continuing breach of the CC&R's," and any damages he suffered would come from that, not a breach by the Pauls. It gave no credence to Smurro's argument that had the Pauls contacted him before complaining to the association they could have resolved the problem short of litigation, because even after the action was filed he continued to deny enforceability of the CC&R's.

As to the indemnity claim, the court ruled that "because there is no causal connection and because the Pauls are not joint tortfeasors, there is no fault to equitably distribute to them."

DISCUSSION

A motion for judgment on the pleadings is essentially the equivalent of a general demurrer, determining whether the complaint states a cause of action. (*Ellerbee v. County of Los Angeles* (2010) 187 Cal.App.4th 1206, 1213.) On appeal, "'[w]e treat the pleadings as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.' [Citation.]" (*Id*. at pp. 1213-1214.) We may also consider facts subject to judicial notice. (*Harris v. Grimes* (2002) 104 Cal.App.4th 180, 185.)

Smurro maintains he adequately pleaded that the Pauls owed a legal duty to him under the view policy and breached it. He challenges the court's finding that any damages he suffered would result from the association's suit and not by the Pauls' acts, claiming the court failed to accept as true the allegations of the cross-complaint. He focuses almost exclusively on the argument the view policy created a duty for the Pauls to notify him before contacting the association.

Smurro ignores, however, a most basic defect in his cross-complaint. Assuming as true only for purposes of this discussion that the view policy imposed a duty on the Pauls to speak with him before complaining to the association, Smurro still failed to adequately plead causation and damages. He makes two allegations: that he was damaged according to proof by their breach and that he was required to hire a lawyer to defend him. Neither withstands scrutiny.

First, as the trial court noted, any damages Smurro might incur would result from the association's action against him for failing to comply with the CC&R's, whether

or not the Pauls complained to him first. Second, as to his argument he was "deprived of his right to the benefit of the investigative and resolution process . . . that could potentially have save him the expense of litigation," as the court pointed out, he continued to dispute his obligation to trim the trees, and that carried through trial. Further, the minute he had notice of the action he could have taken steps to informally resolve the issue and did not. As for hiring a lawyer to defend him, the pleadings reveal Smurro originally appeared in pro. per. And his subsequent hiring of an attorney does not constitute "damages" caused by the Pauls' conduct.

The implied equitable indemnity cause of action is flawed as well. Smurro's theory is that, because the Pauls' breached their duty, they should be liable for part of the damages assessed against him. This makes no sense. The basis for his potential liability is failing to trim his trees as required by the CC&R's. Equitable "indemnity 'is premised on a joint legal obligation to another for damages . . . .'" (*Prince v. Pacific Gas & Electric Co.* (2009) 45 Cal.4th 1151, 1158.) The Pauls had no legal obligation to the association vis-à-vis Smurro's trees, the basis of its claim against Smurro, and therefore no liability for any part of the damages for Smurro's breach of the CC&R's.

Leave to amend is proper when the complaint can reasonably be amended to plead a proper cause of action. (*Kempton v. City of Los Angeles* (2008) 165 Cal.App.4th 1344, 1348.) Based on Smurro's theory of the case we see no way he can amend the complaint and he has suggested none. Instead, he argues only that the pleadings were sufficient and conclusorily claims the court erred in not allowing him to amend.

DISPOSITION

The judgment is affirmed. Respondents are entitled to costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.